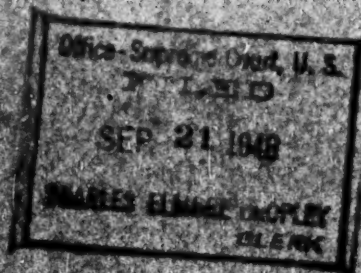


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No. 237

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*In the Supreme Court of the United States*

OCTOBER TERM, 1948

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WISCONSIN ELECTRIC POWER COMPANY, PETITIONER

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE  
UNITED STATES COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT

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MEMORANDUM FOR THE UNITED STATES

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No. 237

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v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SEV-  
ENTH CIRCUIT*

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## **MEMORANDUM FOR THE UNITED STATES**

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### **OPINIONS BELOW**

The opinion of the District Court (R. 140-146) is reported at 69 F. Supp. 743. The opinion of the Court of Appeals (R. 166-168) is reported at 168 F. 2d 285.

### **JURISDICTION**

The judgment of the Court of Appeals was entered on May 26, 1948. (R. 168.) The petition for a writ of certiorari was filed on August 21, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

## QUESTIONS PRESENTED

Section 3411 (a) of the Internal Revenue Code taxes electric companies upon electrical energy sold for domestic or commercial consumption.

1. Does "commercial consumption" refer to the particular process in which the energy is used or does it refer to the nature of the business of the consumer to which the energy is sold, irrespective of the particular process in which it is used?

2. The District Court found and the Court of Appeals upheld the finding that sales of electrical energy to dairies which are principally fluid milk dealers were sales to commercial businesses and not to industrial businesses and hence held the energy was sold for commercial consumption. Should the sales of energy nevertheless be considered as being for other than commercial consumption if it can be found that a substantial part of the energy was used in pasteurization or bottling and similar preparations for the sale and delivery of the milk?

3. Is the decision of the Court of Appeals that the character of the consumption of the energy depends upon the nature of the consuming business contrary to Section 316.190 of Treasury Regulations 46, which provides that where energy consumed at a given location is furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of the tax?

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10-13.

## STATEMENT

During the period April 1, 1940, to July 31, 1943, the petitioner supplied electrical energy to twenty-eight customers engaged in the dairy business in and around Milwaukee, Wisconsin. (R. 147.) Fifteen of the twenty-eight dairies were furnished the energy through more than one electric meter furnished by the petitioner; but in no instances were the separate meters so connected as to enable the energy supplied for one purpose or another in the operations of the dairy to be differentiated. (R. 14, 147-148.)

During this period the taxpayer paid \$6,806.84 in taxes on sales of energy to the twenty-eight customers, computed at the rate of three per cent to June 30, 1940, and three and one-third per cent thereafter. On May 25, 1944, the taxpayer filed with the proper Collector of Internal Revenue a claim for refund of these taxes on the ground that it had erroneously treated the sales of energy as sales for commercial consumption. The claim was rejected by the Commissioner of Internal Revenue on October 16, 1944. (R. 148.) This action was then brought on November 1, 1944. (R. 2.)

The District Court found that twenty-seven of the dairies are predominantly fluid milk dealers



and distributors.<sup>1</sup> (R. 152.) The twenty-seven operate in much the same way. They make contracts with farm producers for purchase of the milk daily and at other regular intervals, sometimes the producers delivering the milk to the dairies, sometimes the dairies supplying the trucks and drivers to pick it up. The dairies then weigh, test and mix the milk to obtain standard quality, pasteurize it, pour it in clean bottles and cans and keep the bottles and cans in cold storage rooms until the delivery men pick them up the same day or the following day. The dairies maintain fleets of trucks and horse-drawn vehicles and employ many drivers to deliver the milk daily and every other day to homes, restaurants, hotels and stores, in accordance with standing and specific orders.. (R. 149.)

The dairies pasteurize the milk with specifically designed equipment. The milk is heated to 143°-145° F., kept at that temperature for thirty minutes and then cooled rapidly down to 38°-40° F. The purpose of pasteurization is to kill pathogenic bacteria in the milk while staying within such tolerances as not to destroy the natural creaming properties of milk nor impart a scorched taste to it. (R. 150.)

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<sup>1</sup> One of the dairies was found to be engaged predominantly in the manufacture of condensed and powdered skim milk and butter fat which it sold at wholesale throughout the United States. The District Court held therefore that sales of electrical energy to it were not for commercial consumption. (R. 148-149.)

Electrical energy is used by the dairies for lighting administrative offices, and garages, as well as the rest of the plant. It is also used to operate electric motors which pump refrigerants, deliver milk to and from pasteurizing vats and to bottling machines, operate cream separators, operate bottle washers and conveyers, operate homogenizers where the dairies have them, and perform similar functions. (R. 151.)

The District Court found that the distribution of milk has existed in the United States as a distinct form of business for nearly a century. Pasteurization of milk on a substantial scale was not established in this country until 1897. It came into use in Milwaukee in 1903, and by 1915 it was quite common practice. But even at the present time there are more raw milk plants in the United States than those which pasteurize their milk. In the cities of over one-thousand population in the United States, a majority of the milk dealers distribute unpasteurized milk; more than twenty-five per cent of all milk sold in such cities is not pasteurized. Two dairying experts testified at the trial that they had never heard of a dairy plant which pasteurized and bottled its milk which was not a distributor. (R. 149-150.)

It also found that while pasteurizing is an important part of the business of the dairies here involved, they likewise utilize systems of rapid regular distribution of fresh milk to their cus-



tomers, and maintain fleets of trucks, horse-drawn wagons and drivers, garages, loading and unloading facilities, weighing and testing devices, storage and refrigeration rooms, and machinery for putting milk into bottles at high speed. The record shows that pasteurization plays a minor part in the total business of the dairies. It utilizes only a small fraction of the total personnel, causes only a minor part of the capital investments and accounts for an insignificant part of the cost of operations. The investment of the dairies in pasteurizing equipment, including increased cooling equipment, is from fifteen per cent to twenty per cent of the total cost of its plant equipment, but this percentage figure would be considerably smaller if the investment in such items as trucks and other vehicles, horses, bottles, cases, *et cetera*, were taken into consideration. Assuming the sale price of a quart of milk in Milwaukee at the time of trial was sixteen cents, the cost of the milk itself was 9.6 cents, the distribution in bottles about four cents, and the entire plant operations about one cent. About one-tenth of a cent of the cost of plant operations is attributable to pasteurization. The predominant business of the dairies involved is, and was, that of fluid milk dealers and distributors. The electricity sold to them by taxpayer, was sold for commercial consumption; it was sold and used in a commercial business. (R. 151-152.)

The District Court concluded as a matter of law that the incidence of the tax on electrical energy

does not depend upon the particular operation in which the energy is used but upon the business of which it forms a part. Since the predominant business of the twenty-seven dairies is, and was, that of fluid milk dealers and distributors, the electricity sold to them by the petitioner was sold for commercial consumption; it was sold and used in a commercial business. (R. 152-153.)

The Court of Appeals held that the findings of the District Court correctly set forth the controlling facts and applied the proper test of commercial consumption. And it adopted the opinion of the District Court as its own. (R. 167-168.)

#### DISCUSSION

The tax involved here is levied "upon electrical energy sold for domestic or commercial consumption." Internal Revenue Code, Section 3411 (a) Appendix, *infra*. In so limiting the tax it is assumed that Congress intended to exempt sales of energy for industrial consumption. *United States v. Public Service Co. of Colorado*, 143 F. 2d 79 (C. C. A. 10th); *St. Louis Refrigerating & Cold Storage Co. v. United States*, 43 F. Supp. 476, 484 (C. Cls.).

We believe the Court of Appeals correctly held that the proper test to be applied in determining whether the electrical energy used by a particular consumer falls within the term "commercial consumption" is whether the predominant character of the business enterprise carried on by the consumer is commercial, irrespective of the particular operations in which the energy is used. (R. 167.)

We believe it also correctly held that sales of energy to dairies, whose predominant business is that of fluid milk dealers and distributors, are sales to commercial consumers and hence for commercial consumption. (R. 167.) We further believe that the applicable Treasury Regulations (Appendix, *infra*) are not at variance with the decision. However, we recognize that the decision of the Court of Appeals on these questions is in conflict with the decision of the Court of Appeals for the Tenth Circuit on the same matter in the case of *United States v. Public Service Co. of Colorado*, *supra*. There the court applied as its test of commercial consumption the operations in which the electrical energy was used by the consumer, holding that because the electrical energy was used in pasteurization and related operations in milk dealing the sales of energy to the dairies were sales for industrial consumption.

There are pending in various District Courts and the Court of Claims fifty-three suits for refund of sums totaling more than \$260,000 involving the application of this tax to sales of electrical energy to dairies similar to those in the instant case and in the *Public Service Co. of Colorado* case, *supra*. There is also reason to believe that numerous other suits will be brought, as there have already been submitted to the Commissioner of Internal Revenue several hundred claims for refund involving the same problem. The tax with respect to sales of

energy to this type of consumer is presently not being collected in the Tenth Circuit but is elsewhere, although the nature of the consumption involved in the Tenth Circuit is not substantially different from that involved in the other circuits.

We believe a decision by this Court is necessary to clarify and resolve the conflict of principles applicable to the construction and application of this statute and to assure uniformity in the collection of the electrical energy excise tax.

#### CONCLUSION

For the foregoing reasons we do not oppose the petition in this case.

Respectfully submitted,

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SEPTEMBER 1948.

## APPENDIX

## Internal Revenue Code:

## SEC. 3411. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

\* \* \*

(26 U. S. C. 1946 ed., Sec. 3411.)

Section 3411 (a) was amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 521(a) (19), to change the three per cent tax to three and one-third per cent but left the section otherwise the same.

Treasury Regulations 42, promulgated under the Revenue Act of 1932:

Art. 39 [as amended by T.D. 4922, 1939-2 Cum. Bull. 363]. *Effective period.*—The tax applies to electrical energy sold prior to July 1, 1941.

Art. 40 [as amended by T.D. 4393, XII-Cum. Bull. 322 (1933)]. *Scope of tax.*—The



tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.



## Treasury Regulations 46 (1940 ed.):

Sec. 316.190 [as added by T. D. 5099, 1941-2 Cum. Bull. 267]. *Scope of tax.*—The tax imposed by section 3411 (a) of the Internal Revenue Code, as amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.

The term “electrical energy sold for domestic or commercial consumption” does not include (1) electrical energy sold for industrial consumption, e.g., for use in manufacturing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others.

Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i.e., whether

for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

\* \* \*